Petition

81-1909

Supreme Court, U.S.
FILED
APR 12 1982
ALEXANDER L. STEVAS
CLERK

No.

SUPREME COURT OF THE UNITED STATES

October 1981 Term

MARK S. FORRESTER,]
]
Petitioner,]
]
vs.]
]
CALIFORNIA,]
]
Respondent.]
]

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

KEITH C. MONROE, INC.
Attorney at Law
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Attorney for Petitioner

(a) THE QUESTION PRESENTED FOR REVIEW:

Is the Due Process Clause of the Fourteenth Amendment offended by non-disclosure of the identity and non-production of the person of an informant who could give relevant and admissible evidence helpful to a defendant?

No.

SUPREME COURT OF THE UNITED STATES

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MARK S. FORRESTER,]
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

The petitioner, Mark Stephen Forrester, does hereby respectfully petition the Court for a writ of certiorari addressed to the Court of Appeal of the State of California, Fourth Appellate District, Division Two, to review a judgment of that Court entered on November 16, 1981, and, as to which, the Supreme Court of California denied a hearing by an order entered on Febru-

ary 10, 1982. The sections of the petition are designated by letter consistent with those used in Rule 21.1, Rules of the Supreme Court of the United States.

(a) THE QUESTION PRESENTED FOR REVIEW:

Is the due process clause of the Fourteenth Amendment offended by non-disclosure of the identity and non-production of the person of an informant who could give relevant and admissible evidence helpful to a defendant?

(b) THE PARTIES ARE NAMED IN THE CAPTION.

(d) REPORTS OF ANY OPINIONS:

The opinion of the California Court of Appeal in this case was ordered not published and there is, therefore, no report thereof. The text of that opinion is reproduced as Appendix "A" to this petition.

(e) JURISDICTION OF THIS COURT:

(i) The judgment sought to be reviewed

was entered by the Court of Appeal on November 16, 1981. A timely petition for hearing was filed in the California Supreme Court. The petition for hearing was denied without opinion by the California Supreme Court on February 10, 1982. The judgment sought to be reviewed therefore became final on that date. (iv) The statutory provision which is believed to confer on this Court jurisdiction to review the judgment of the California Court of Appeal is 28 U.S.C. §1257(3).

(f) CONSTITUTIONAL PROVISIONS INVOLVED:

Two constitutional amendments are involved in this case. They are:

> Amendment Six. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted

with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment Fourteen, Section One. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(g) STATEMENT OF THE CASE: [1/]

Following a preliminary examination the petitioner was charged by information with a violation of California's

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1/ The record of the case consists of nine volumes of Reporter's Transcript and a single volume Clerk's Transcript. The Reporter's Transcript is paginated with the volume number first followed by a dash, followed by the page number. References to the record will be enclosed in brackets using the above system to refer to the Reporter's Transcript. References to the Clerk's Transcript will be preceded by the letter C followed by the page number of that record.

Controlled Substances Act, possession of cocaine for sale, Health & Safety Code §11351. [C 1] Following trial by jury the petitioner was found guilty of that violation. [C 228] Sentence was to state prison for a term of three years. [C 243-245] Bail pending appeal was granted and the petitioner is presently at liberty, having posted such bail. Prior to trial of the case a motion was made to compel disclosure of the identity of a confidential informant. That motion was denied. [C 139] The identity of the confidential informant was never disclosed during the course of trial, nor was the informant ever called as a witness at trial. The motion was presented on the fundamental ground that nondisclosure deprived the defendant of a fair trial. [4-109] 4-115] Specifically, disclosure was

sought on the ground that the informant could and would provide exculpatory evidence useful to the defendant. The evidence which bears on this issue will now be stated.

Officer Searle of the Los Angeles Police Department applied for and obtained a search warrant for a residence at 34571 Calle Rosita, Capistrano Valley. The affidavit submitted in support of the warrant set forth Officer Searle's qualifications as a narcotics enforcement officer. It then stated that about a month before Officer Searle had received information from a confidential, reliable informant that John Bloker was trafficking in cocaine from the described residence. It further stated that the informant had told Searle that during the past 48 hours the informant had been inside the residence and while

there had a conversation with John Bloker. During the conversation, according to the affidavit, the informant was shown some two ounces of cocaine packaged in a clear plastic bag. The informant further stated, according to the affidavit, that John Bloker had offered to sell him ounce quantities of cocaine at that time and any other quantity wanted in the future. [C 55-56] The affidavit then goes on to provide information forming a basis for crediting the informant's information. The affidavit nowhere mentions this petitioner.

Armed with the warrant, Officer Searle and a fellow officer, Edward Hoffman, went to the described residence and commenced to covertly surveil it. [6-6; 6-7] The surveillance started about 7:00 p.m. on May 16, 1978. About an hour later a dark colored Mercedes

Benz drove up and parked at the curb in front of the house. [6-9] The lights on the car were turned out and a figure emerged from it. The figure walked down the driveway of the residence and disappeared from view. Officer Hoffman, who was watching these activities, moved his car closer at that point.

After the passage of a short period of time, the petitioner came out of the front door of the residence. [6-12] He got into the Mercedes, started it and then backed it into the driveway of the residence. [6-13] He got out of the car, went around to the back and opened the trunk. [6-14] He then closed the trunk and walked back into the house through the door out of which he had come. As he walked from the car to the house, the officers saw what appeared to be a plastic bag in

his hands of 12 to 14 inch square size. [6-15]

The petitioner testified at trial that he had, at an earlier time, sold an automobile to John Bloker. [9-20] He had, on this occasion, brought over some floor mats that belonged to the car he had sold to Bloker. When he went to the car he had taken the floor mats out of the trunk and taken them into Bloker. [9-22]

After the passage of a few more minutes, another car, driven by a female, drove up and stopped at the house. [6-19] Officer Hoffman gave the signal by radio to execute the search warrant. He approached the female who had just driven up and identified himself. The officers went with her to the door of the residence where, upon knocking, it was answered by the petitioner. The

officers entered and then conducted a search of the premises. [6-21] John Bloker was in the living room in a wheel chair. On a couch in the living room the officers found a plastic bag containing cocaine which was, in the opinion of Officer Hoffman, the object which he had seen the petitioner carry in the front door of the house. [6-21]

Items found in the search clearly indicated that the residence was Bloker's. Bloker was tried jointly with the petitioner and was found guilty and sentenced to state prison.* [C 242] Bloker did not testify at trial. However, Bloker, at some point prior to trial, had signed a statement acknowledging that the contraband found in the house belonged to him. [C 43]

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* Bloker was not a party to the appeal from the judgment.

There was no evidence that the petitioner had any connection with that residence other than as a visitor on that particular occasion.

The federal question sought to be reviewed was first raised before the trial court by means of a pretrial evidentiary motion. Disclosure of the identity of the informant was sought on fair trial - due process grounds. [4-109; 4-112]** The motion was denied. [4-168] On appeal from the judgment, fair trial - due process error was urged on Pages 13 through 26 of the petitioner's (there appellant's) opening brief, citing at Page 16 thereof Roviaro v. United States, 353 U.S. 53;

** Counsel urged the need to examine the informant to determine his knowledge of petitioner as possibly a user of contraband as opposed to a purveyor and, in addition, the informant would have evidence of dominion and control on the part of Bloker alone.

1 L.Ed.2d 639; 77 S. Ct. 623 (1957) as authority. On petition for hearing to the California Supreme Court the issue was also raised at Pages 13 through 26 of that petition.

(i) COPIES OF OPINIONS:

A copy of the California Court of Appeal opinion is appended to this petition as Appendix "A". In addition thereto, a copy of the order of the California Supreme Court denying a hearing is appended hereto as Appendix "B".

(j) REASONS FOR GRANTING THE WRIT:

The confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment each require disclosure of the identity of the informant in this case.

Fundamental to Anglo-Saxon jurisprudence is the principle that the government may not prosecute an accused and at the same time withhold from him

evidence helpful to his defense. Brady v. Maryland, 373 U.S. 83; 10 L.Ed.2d 215; 83 S. Ct. 1194 (1963); Pyle v. Kansas, 317 U.S. 213; 87 L.Ed. 214; 63 S. Ct. 177 (1942). Considerable insight into this case can be gained from an examination of the accusatory pleading which was filed in the trial court. Both this petitioner and John Bloker were charged in Count I of that pleading with possession of cocaine for the purpose of sale.[2/] Bloker alone was charged in two additional Counts.

2/ California Health & Safety Code Section 11351, violation of which the petitioner was convicted, requires a sentence of two, three or four years in the state prison. Simple possession of the same controlled substance is governed by California Health & Safety Code Section 11350. That section merely prescribes imprisonment in the state prison. However, California Penal Code Section 18 directs that when an offense is punishable by imprisonment in the state prison without specification of a term, the term shall be 16 months or two or three years.

Count II charged him on the same date with possession of marijuana for sale and Count III charged him on the same date with possession of concentrated cannabis. [C 1-2] The jury found Bloker guilty on all three Counts.

As noted above, the prosecutor conceded that the residence "was clearly Bloker's." [C 43] The quantity of marijuana and cannabis which supported the conviction of Bloker on Counts II and III came from the search of other portions of his residence.

Thus, it is clear that the prosecution did not urge a theory that this petitioner exercised dominion and control over the contents of the residence generally. Rather, the theory relied upon was, unmistakably, a theory that this petitioner had carried in from the trunk of his car a plastic bag contain-

ing cocaine which was found in the living room.

Essential to proof of this theory was the testimony of Officer Hoffman to the effect that he had seen this petitioner carry from the trunk of his car into the house what appeared to be a large plastic bag. The events in question took place no earlier than 8:15 p.m. on May 16th. Therefore, it was pitch dark. The officer, in making the observations he did, was crouched down in the back seat of his car looking through binoculars. The crucial point, therefore, of this petitioner's conviction is the evidence given by the officer as to what he saw or believed he saw in the petitioner's hands as he made the short walk from the car back into the house.

The informant, according to the

content of the search warrant affidavit, had been present in the Bloker residence not more than 48 hours previously. While there, the informant had been shown a quantity of cocaine. The informant, therefore, could have identified the container of cocaine which he had been shown by Bloker. Such testimony, had it been adduced, would have added immeasurably to the credibility of the petitioner's testimony to the effect that he had brought no drugs to the house, but had instead brought in an automobile floor mat from the trunk of his car.

The touchstone here, of course, must be this Court's holding in Roviaro v. United States, supra. This Court held in that case that the question of informant disclosure was one which required, on a case-by-case basis, bal-

ancing the public interest in protecting the flow of information against the individual's right to prepare his defense. 353 U.S. at 62. That standard has been discussed and applied in numerous subsequent situations.

This Court again had occasion to deal with the subject in McCray v. Illinois, 386 U.S. 300; 18 L.Ed.2d 62; 87 S. Ct. 1056 (1967) The issue was presented in McCray in the context of a warrantless arrest and search of the person of the petitioner based on probable cause supplied by an undisclosed informant. In affirming in McCray, the Court made it clear that the Constitution does not compel disclosure of an informant's identity where the question before the Court is the preliminary one of probable cause. 386 U.S. at 311. The Due Process Clause, the Court noted,

does not require a state court judge in a preliminary hearing to assume that the arresting officers are committing perjury. 386 U.S. at 313.

The case at bar does not involve a preliminary question of probable cause. Rather, the question presented to the California courts and the question presented to this Court goes to the very heart of the violation charged against this petitioner. On a dark night in a dark area the officer saw something in the hands of the petitioner. The officer was there with a search warrant expecting to see cocaine. During the few brief seconds that the officer had to look and try to identify whatever it was the petitioner had in his hands, the possibility of innocent mistake on the officer's part was overwhelmingly high. The conviction of this pe-

titioner rests squarely on that identification by the officer.

Counsel invites the Court's attention to the discussion of this subject in Suarez v. United States, 582 F.2d 1007, 1011 (C.A.5,1978) There the Court of Appeals categorized these cases into three classes. The first are those such as Roviaro itself in which the informant played an active role in the events underlying a defendant's potential criminal liability. Disclosure and production of the informant is almost always required to ensure a fair trial. The second class discussed in Suarez are those in which the informant was a mere tipster. Disclosure in those cases is not required. Finally, the Suarez Court notes that there is a third class. In the third class there is a distinct possibility that a defendant might ben-

efit from disclosure, but the government claims a compelling need to protect its informant. Disclosure in the third class is not necessarily required. Rather, in the third class it becomes a balancing process, balancing the importance of the informant's testimony to the defendant's case against the strength of the government's interest in maintaining the informant's anonymity. The Court of Appeals suggested that one desirable means of dealing with the third class of cases was by way of an in camera hearing.

An in camera hearing was conducted by the trial court judge in this case. [4-168] The transcript of that in camera hearing has been ordered sealed and counsel has no knowledge of what transpired. The Court's attention is invited to the holding of the Ninth Circuit

Court of Appeals in United States v. Anderson, 509 F.2d 724 (C.A. 9,1975). In Anderson, the Ninth Circuit suggests a procedure which, it is suggested, should constitute the minimum constitutional method of dealing with this type of problem. In that case, the Ninth Circuit suggested that if it was a case appropriate for an in camera hearing on the issue of disclosure, the trial court could conduct an in camera hearing to which defense counsel, but not the defendant, was admitted. Defense counsel then could, of course, cross-examine the witness or witnesses presented at that hearing. The trial court could and should place defense counsel under enforceable orders against unwarranted disclosure of the evidence presented in that hearing in the event disclosure of the identity of the informant was

not ordered. 509 F.2d at 729-730.

Counsel suggests that the procedure outlined in Anderson constitutes the minimum procedure required under the confrontation clause and the due process clause. The facts of this case serve as a classic illustration.

The co-defendant, Bloker, elected not to testify. Thus, his knowledge of where the cocaine had come from and whether or not this petitioner had delivered it to him was not available to counsel for the petitioner. There was one other person, and one other only, who could identify the cocaine found in the house as that which he had seen there earlier. That one person was the informant.

It is not sufficient in determining a question of this gravity to depend on examination by the trial judge

and the prosecuting attorney. The prosecuting attorney is an advocate who at the time of such a hearing has taken a strong stand against disclosure. He certainly cannot be counted upon to cross-examine the witness in an in camera hearing in such a manner as to bring about disclosure.

The judge, although not an advocate, suffers from a disabling handicap if it is suggested that the judge may be able to adequately examine the witness at such a hearing. The judge is not intimately familiar with all of the evidence in the case because he has heard only that which has been presented. Much more to the point, however, is the fact that the judge cannot possibly know the theory of defense of the case because he has had no access to it whatever. On the face of it, it would vio-

late the defendant's Fifth Amendment rights to be required to reveal the theory of the defense to the judge in advance of its presentation. Therefore, since neither judge nor prosecuting attorney can effectively examine the witness in such a hearing on behalf of the defendant, exclusion of defense counsel from such a hearing effectively deprives a defendant of his rights of confrontation and representation by counsel.

Finally, counsel invites the Court's attention to a recent decision of the Tenth Circuit Court of Appeals, Gaines v. Hess,662 F.2d 1364 (C.A. 10 1981). This petition has proceeded on the assumption that the question of disclosure of informant identity is a question which involves constitutional due process and confrontation questions,

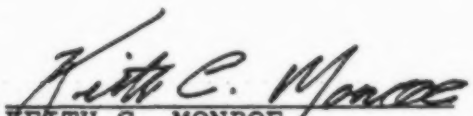
Neither Roviaro, supra, nor McCray, supra, specifically so hold. It is possible to read Roviaro as being a "supervisory powers" case. Counsel suggests that even if Roviaro was a "supervisory powers" case, the basic principles discussed in the case necessarily have their foundations in the due process clause of the Constitution. The Gaines Court discusses this question and reaches a square holding that questions of this nature do have their foundations in the Due process Clause. 662 F.2d at 1368-1369.

CONCLUSION: Based upon the foregoing arguments and authorities, the Court is respectfully requested to issue a writ of certiorari directed to the California Court of Appeal, Fourth Appellate District, Division Two, directing that its decision be reviewed

by this Court.

RESPECTFULLY SUBMITTED,

KEITH C. MONROE, INC.

By 
KEITH C. MONROE
Attorney for Petitioner

Appendix

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH DISTRICT

SECOND DIVISION

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff & Respondent, vs. MARK STEPHEN FORRESTER, Defendant & Appellant.	Court of Appeal- Fourth Dist. FILED Nov. 16 1981 ROBERT L. FORD, Clerk _____ Deputy Clerk 4 Crim.14182 (Sup.Ct.C-41496) O P I N I O N

APPEAL from the Superior Court, County of Orange. Kenneth E. Lae, Judge. Affirmed.

William K. Gamble for Defendant and Appellant.

George Deukmejian, Attorney General, and Jay M. Bloom, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and John Bloker, (not a party to this appeal) were convicted of possession of cocaine for sale. Bloker

was also convicted of possession of marijuana for sale and possession of hashish.

Armed with a search warrant for Bloker's home in Orange County, Los Angeles officers conducted a surveillance of the house in order to determine the appropriate time to make their entry. They saw the defendant drive up. The defendant was not mentioned in the search warrant and the officers knew nothing about him. They saw him take a plastic bag containing a white substance into the residence. About that time another car drove up. The officers approached this car and discovered that it was a lady who was the live-in girl friend of the occupant of the premises. They advised her that they had a search warrant and went to the door with her. She knocked on the door. The door opened and the defendant answered the door.

The officers displayed their identification, said they were police officers and had a search warrant for the residence. Defendant then disappeared behind the door. At this point, the officers pushed the door open because they felt that the defendant was either covering himself because he had a weapon or he was going for a weapon. Contraband was found in the residence. So was Mr. Bloker.

At trial, the defendant's testimony was that he did not bring any drugs into the house and he did not see any drugs in the house.

Defendant first contends that there is a violation of Penal Code §1531 because the officers were not refused admittance before they entered.

The court felt there was substantial compliance with this section and we agree. The officers knocked, ident-

ified themselves and were in the company of a resident. There was no danger of violent confrontation. Their actions thereafter were based on the possibility that the defendant might be going for a weapon. Under these circumstances, the officers could reasonably believe that entry had been refused insofar as the defendant was concerned. Therefore, there was not only substantial compliance with the section but exact compliance was excused because of the behavior of the defendant.

Defendant next contends that the court erred in refusing to order disclosure of a confidential informant.

This informant gave the Los Angeles police the information which resulted in the issuance of the search warrant for Bloker's residence. The informant gave no information about

the defendant and the officers did not even know he existed at the time they arrived at the house. Thereafter, they saw the defendant drive up and deliver that which they could reasonably conclude was cocaine. They went inside the residence; they found the defendant and the cocaine. The informant was not present. In camera hearings were held and the court found that the informant was not a material witness. From this transcript it is obvious there is no reasonable probability that the informant could give evidence on the issue of guilt which might exonerate the defendant. The informant merely gave police the information which resulted in the search warrant. Inasmuch as the defendant's defense was that he did take something into the house but it was not cocaine and since the infor-

mant was not there, the informant could not possibly provide any information which would have exonerated the defendant at trial.

Defendant's last contention is that the officers improperly used binoculars in observing him when they saw him drive up, secure the cocaine and go into the house.

It is true that the officers used binoculars and they testified that these binoculars aided their information but also said that they could have seen him without the binoculars. Inasmuch as the defendant was standing by his car, parked in the driveway in front of the house where he could be seen from a public street with or without binoculars, it is hard to say there there was any violation of a right to privacy by the use of these binoculars which

aided the officers. They did not give the officers a view they might otherwise not have had.

Judgment affirmed.

/s/ Gardner
P.J.

We concur:

/s/ McDaniel
J.

/s/ Morris
J.

Not to be published
in official reports

APPENDIX "B"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

FEB 10 1982

I have this day filed Order

HEARING DENIED

In re: 4 Crim. *No.* 14182

People

vs.

Mark Stephen Forrester

Respectfully,

Clerk

APPENDIX "B"

PROOF OF SERVICE BY MAIL

I am employed in the county of Orange, state of California; my business address is 1428 North Broadway, Santa Ana, California, 92706; I am over the age of eighteen years and not a party to the within action.

On April 10, 1982, I served the within Petition for a Writ of Certiorari on the interested parties in said action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Ana, California, addressed as follows:

CLERK, SUPREME COURT
State of California
3580 Wilshire Blvd.
Los Angeles, Ca.90010

CLERK,COURT OF APPEAL
Fourth Appellate District
303 West Third Street
San Bernardino, Ca.92401

GEORGE DEUKMEJIAN (3)
Attorney General
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110 West "A" Street
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CECIL HICKS
District Attorney
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Post Office Box 808
Santa Ana, Ca. 92702

THE HON. KENNETH E. LAE
Judge, Superior Court
County of Orange
700 Civic Center Dr. West
Santa Ana, Ca. 92701

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of April, 1982, at Santa Ana, California.

Donna L. Small

DONNA L. SMALL